

STATE OF CALIFORNIA

Supplement to
General Plan Guidelines

Draft Tribal Consultation Guidelines

2005

Draft for Public Review

February 22, 2005

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH

Table of Contents

Part A: SB 18 Context and Basic Requirements.....	3
I. Introduction.....	3
II. Background Information.....	4
<i>California Native American Cultural Places.....</i>	<i>4</i>
<i>California Native American Tribes.....</i>	<i>5</i>
III. Basic Requirements of SB 18	6
<i>Responsibilities of OPR</i>	<i>6</i>
<i>Responsibilities of Local Governments.....</i>	<i>7</i>
<i>Other Elements of SB 18.....</i>	<i>7</i>
<i>Process Overview: General Plan or Specific Plan Adoption or Amendment.....</i>	<i>8</i>
Part B: When and How to Consult with California Native American Tribes	10
IV. Consultation: General Plan and Specific Plan Adoption or Amendment.....	10
<i>What Triggers Consultation?.....</i>	<i>10</i>
<i>Identifying Tribes through the NAHC.....</i>	<i>10</i>
<i>Contacting Tribes Pursuant to Government Code §65352.3.....</i>	<i>11</i>
<i>After Notification is Sent to the Tribe</i>	<i>12</i>
<i>Conducting Consultation on General Plan or Specific Plan Adoption or Amendment.....</i>	<i>13</i>
<i>When is Consultation Over?</i>	<i>15</i>
V. Consultation: Cultural Places Located in Open Space	16
<i>What Triggers Consultation?.....</i>	<i>16</i>
<i>Conducting Consultation Regarding Open Space</i>	<i>17</i>
<i>When is Consultation Over?</i>	<i>18</i>
Part C: Suggested Protocols and Other Recommendations	19
VI. Suggested Protocols for Consultation.....	19
VII. Mitigation of Impacts and Preservation of Cultural Places	21
<i>What is Preservation and Mitigation?</i>	<i>22</i>
<i>Places, Features, and Objects</i>	<i>22</i>
<i>Mitigation “Where Feasible”.....</i>	<i>23</i>
<i>Monitoring and Management</i>	<i>23</i>
<i>Mitigation and Private Landowner Involvement.....</i>	<i>23</i>
VIII. Confidentiality of Information.....	24
<i>Public Disclosure Laws</i>	<i>24</i>
<i>Additional Confidentiality Procedures</i>	<i>26</i>

	<i>Confidentiality Procedures for Private Landowner Involvement</i>	26
IX.	Procedures to Facilitate Voluntary Landowner Protection Efforts.....	27
	<i>Landowner Education and Participation</i>	27
	<i>Private Conservation Efforts</i>	28
X.	Open Space for the Protection of Cultural Places.....	29
Part D:	Additional Resources	30
XI.	Additional Resources	30

Part A

SB 18 Context and Basic Requirements

Sections I through III of the 2005 Supplement provide background information to familiarize local government agencies with the intent of Senate Bill (SB 18) and the importance of protecting California Native American traditional tribal cultural places. Local governments will be better prepared to enter into consultations with tribes if they have a basic knowledge of tribal concerns and the value of cultural places to tribes. The key provisions of SB 18 are also outlined in table and text form.

I. Introduction

This 2005 Supplement to the *2003 General Plan Guidelines* addresses the requirements of SB 18, authored by Senator John Burton and signed into law by Governor Arnold Schwarzenegger in September 2004. SB 18 requires local governments to consult with California Native American tribes to aid in the protection of traditional tribal cultural places (“cultural places” as used in this document) through local land use planning. SB 18 also requires the Governor’s Office of Planning and Research (OPR) to include in the *General Plan Guidelines* advice to local governments for how to conduct these consultations. The notice and consultation requirements for local governments under SB 18 take effect on March 1, 2005.

The intent of SB 18 is to provide California Native American tribes an opportunity to influence local (city and county) land use decisions at an early planning stage, for the purpose of protecting cultural places. SB 18 requires local governments to consult with tribes prior to making certain planning decisions and provide notice to tribes at certain key points in the planning process. These consultation and notice requirements apply to adoption and amendment of both general plans (defined in Government Code §65300 et seq.) and specific plans (defined in Government Code §65450 et seq.). The purpose of involving tribes at these early planning stages is to allow consideration of cultural places in the context of broad local land use policy, before individual site-specific, project-level land use decisions are made by a local government.

Although SB 18 does not specifically mention consultation or notice for adoption or amendment of specific plans, existing state planning law requires local governments to use the same processes for adoption and amendment of specific plans as for general plans (see Government Code §65453). Therefore, where SB 18 requires consultation and/or notice for a general plan adoption or amendment, the requirement extends also to a specific plan adoption or amendment.

The 2005 Supplement provides a basic framework for local governments to use in developing their own unique consulting and notification processes in accordance with the statutory requirements of SB 18. The 2005 Supplement:

- Provides background information regarding California Native American cultural places and tribes.
- Outlines the basic requirements of SB 18.

- Provides step-by-step guidance to local governments on how and when to consult with tribes.
- Offers advice to help local governments effectively engage in consultation with tribes.
- Provides information about preserving and/or mitigating impacts to cultural places.
- Discusses methods to protect confidentiality of information regarding cultural places.
- Presents ways of encouraging voluntary landowner involvement in the preservation of cultural places.

II. Background Information

The principal objective of SB 18 is to preserve and protect cultural places of California Native Americans. SB 18 is unique in that it requires local governments to involve California Native Americans in early stages of land use planning, extends to both public and private lands, and includes both federally recognized and non-federally recognized tribes. This section provides an overview of California Native American cultural places and California Native Americans.

California Native American Cultural Places

SB 18 relies upon Public Resources Code §5097.9 and 5097.995 in defining cultural places:¹

- Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine (Public Resources Code §5097.9).
- Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site (Public Resources Code §5097.995).²

California Native American cultural places include, but are not limited to, the following:

- Prehistoric and historic places of tribal habitation and activity – village sites, burial grounds, and ceremonial sites.
- Places or sites associated with creation stories or other significant historical incidences.
- Artifacts associated with California Native American prehistoric and historic places.
- Collection or gathering sites – specific places where California Native Americans access certain plants or animals for food, clothing, ceremonial objects, and basket making.
- Structures, inscriptions, artwork, and geographical features with religious significance.
- Places of worship.

¹ Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

² *Ibid.*

Native American cultural places are located throughout California because California Native American people from hundreds of different tribes made these lands their home for over thousands of years. Due to the forced relocation of tribes by the Spanish, Mexicans, and Americans, most tribes do not currently occupy or own the lands on which their cultural places are located. As a result, California Native Americans have restricted abilities to maintain, protect, and even access many of their cultural places.

A number of federal and state laws have been enacted to preserve cultural resources and have enabled some Native American tribes to promote the protection and preservation of their cultural places. The Archaeological Resources Protection Act (ARPA) makes desecration of Native American cultural places on federal or Native American lands a felony. The National Historic Preservation Act, which established historic preservation as a national policy in 1966, includes a Section 106 review process that requires consultation to mitigate damage to historic sites, including Native American cultural places, whenever any agency directs a project using federal funds. The National Environmental Policy Act (NEPA) requires every federal project to include in an Environmental Impact Statement documentation of environmental concerns, including effects on important historic, cultural, and natural aspects of our national heritage. Presidential Executive Order 13007, "Indian Sacred Sites," ensures that federal agencies are as responsive as possible to the concerns of Native American tribes regarding sacred sites.

[Placeholder text. Paragraph on state laws regarding historical and cultural site preservation will be added.]

While these and other laws permit Native Americans to have some say in how impacts to cultural places could be mitigated, the laws rarely result in Native American input at early stages of land use planning. Generally, these laws provide protection only to those sites located on public or Native American lands and primarily address the concerns of Native Americans who belong to federally recognized tribes.

California Native American Tribes

SB 18 uses the term California Native American tribe and defines this term as “a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission” (NAHC). As used in this document, the term “tribe(s)” refers to California Native American tribes.

California has the highest number of tribes of any state in the United States and has the largest Native American population as well (383,197 according to a California Department of Finance estimate). As of 2004, California was home to 109 federally recognized tribes and several dozen non-federally recognized tribes.

The federal government has acknowledged the inherent sovereignty of tribes in the U.S. Constitution. Tribal sovereignty precedes state structures and establishes a tribe’s right to govern themselves without state authority. This political status affords tribes a unique relationship with the federal government, which gives them the right to self-governance. Such self-governance

includes the right of tribes to preserve and perpetuate the tribes' culture, religion, tradition, and customs. SB 18 recognizes this inherent tribal interest in protecting and preserving their cultural places, as they are essential to a tribe's right of self-governance.

Tribal governments throughout California vary in organizational forms and size. Some tribes use the government form established under the Indian Reorganization Act of 1934 (25CFR81) with an adopted constitution and bylaws. Other tribes have adopted constitutions and bylaws which incorporate traditional values in governing tribal affairs. Many tribal governments are comprised of a decision making body of elected officials (tribal governing body) with an elected or designated tribal leader.³ In general, tribal governing bodies and leaders serve for limited terms and are elected or designated by members of the tribe. Tribal governments control tribal assets, laws/regulations, membership, and land management decisions that affect the tribe.

For tribes that do not have federally designated trust land (sovereign land) and those that are not federally recognized, the duties of the tribal government may be slightly different. (Non-recognized tribes are those tribes and Indian groups that are not members of a federally-recognized tribe.) It should be noted that tribes without trust land and non-recognized tribes are just as committed to the protection of their cultural places as other tribes.

III. Basic Requirements of SB 18

This section provides a brief summary of the statutory requirements of SB 18. Later sections of the Supplement provide additional detail regarding these requirements and offer advice to local governments on how to fulfill the notification and consultation requirements of SB 18. (*Please refer to Section IV and Section V of these guidelines for additional information regarding the responsibilities outlined below.*)

Responsibilities of OPR

SB 18 requires the Governor's Office and Planning and Research (OPR) to amend the *General Plan Guidelines* to contain advice to local governments on:

- Consulting with tribes for the preservation of, or the mitigation of impacts to, cultural places.
- Procedures for identifying through the Native American Heritage Commission (NAHC) the appropriate California Native American tribes with whom to consult.
- Procedures for continuing to protect the confidentiality of information concerning the specific identity, location, character, and use of cultural places.
- Procedures to facilitate voluntary landowner participation to preserve and protect the specific identity, location, character, and use of cultural places (Government Code §65040.2(g)).

³ Some tribes still use lineal descent as the means of identifying the tribe's leader.

Responsibilities of Local Governments

SB 18 establishes responsibilities for local governments to contact, provide notice, refer plans, and consult with tribes. The following list briefly identifies the contact and notification responsibilities of local governments.

- Prior to the adoption or any amendment of a general plan or specific plan, a local government must notify tribes (on the contact list maintained by the NAHC) of the opportunity to conduct consultations for the purpose of preserving or mitigating impacts to cultural places located within the local government's jurisdiction. Tribes have 90 days from the date on which they receive notification to request consultation, unless a shorter timeframe has been agreed to by the tribe (Government Code §65352.3).
- Prior to the adoption or substantial amendment of a general plan or specific plan, a local government must refer the proposed action to those tribes that are on the NAHC contact list and have traditional lands located within the city or county's jurisdiction. The referral must allow a 45 day comment period (Government Code §65352). Notice must be sent regardless of whether prior consultation has taken place. Such notice does not initiate a new consultation process.
- Local government must send notice of a public hearing, at least 10 days prior to the hearing, to tribes who have filed a written request for such notice (Government Code §65092).

Under SB 18, local governments must consult with tribes under two circumstances.

- On or after March 1, 2005, local governments must consult with tribes that have requested consultation in accordance with Government Code §65352.3. The purpose of this consultation is to preserve or mitigate impacts to cultural places that may be affected by a general plan or specific plan amendment or adoption.
- On or after March 1, 2005, local governments must consult with tribes before designating open space in the general plan, if the affected land contains a cultural place and if the affected tribe has requested public notice under Government Code §65092. The purpose of this consultation is to protect the identity of the cultural place and to address appropriate treatment or management of the cultural place (Government Code §65562.5).

Other Elements of SB 18

In addition to the notice and consultation requirements outlined above, SB 18 amends Government Code §65560 to allow the protection of cultural places in the open space element of the general plan. (*See Section X.*) SB 18 also amends Civil Code §815.3 and added California Native American tribes to the list of organizations that can acquire and hold conservation easements. Tribes on the contact list maintained by the NAHC now have the ability to acquire, on terms mutually satisfactory to the tribe and the landowner, conservation easements for the purpose of protecting their cultural places. (*See Section IX.*)

Process Overview: General Plan or Specific Plan Adoption or Amendment

As discussed above, SB 18 establishes responsibilities for local government to contact, refer plans, and consult with tribes. The following table provides an overview of SB 18 requirements related to the adoption or amendment of a general plan or specific plan. All statutory references are to the Government Code (GC).

Overview of SB 18 Consultation and Notice Requirements

<i>Step</i>	<i>OPR Guidelines (GDL) Section and Statutory Reference</i>
Adoption or amendment of any general plan (GP) or specific plan (SP) is proposed on or after March 1, 2005.	GDL Section IV GC §65352.3(a)(1)
Local government sends proposal information to NAHC and requests contact information for tribes with traditional lands or places located within city or county’s jurisdiction.	GDL Section IV GC §65352.3(a)(2)
NAHC provides tribal contact information. (OPR recommends within 30 days of receiving local government’s request.)	GDL Section IV
<i>If NAHC responds that no traditional lands or cultural places are affected, consultation is not required.</i>	GDL Section IV
Local government contacts tribe(s) and invites them to consult.	GDL Section IV
Tribe(s) must respond to local government’s request within 90 days, indicating whether or not they want to consult with local government. – Tribes can agree to a shorter timeframe (less than 90 days) to request consultation. – Consultation does not begin until/unless a tribe requests it.	GDL Section IV GC §65352.3(a)(2)

<i>Step</i>	<i>OPR Guidelines (GDL) Section and Statutory Reference</i>
<i>If tribe does not respond within 90 days or declines consultation, consultation is not required.</i>	GDL Section IV
<p>Consultation begins, if requested by tribe. No set timeframe for consultation to end.</p> <ul style="list-style-type: none"> – May continue through planning commission or board of supervisors/city council deliberation on plan proposal. 	GDL Section IV
Local government continues normal processing of GP/SP adoption or amendment. (CEQA review, preparation of staff reports, consultation, etc., may be ongoing.)	
<p>45 days before local government adopts or <u>substantially</u> amends GP/SP, local government refers proposed action to agencies, including tribe(s).</p> <ul style="list-style-type: none"> – Referral required regardless of whether or not there has been prior consultation. – This does not initiate a new consultation process. – This opens 45 day comment period before approval by board of supervisors/city council. – Referral only required on or after March 1, 2005 	GC §65352(a)(8)
10 days before public hearing, local government provides notice of hearing to tribes and any other persons who have requested such notice.	GC §65092
Public hearing of board of supervisors/city council takes final action on the GP/SP.	

Part B

When and How to Consult with California Native American Tribes

Sections IV and V of the 2005 Supplement provide step-by-step guidance to local government agencies on how and when to consult with tribes, including when to provide certain types of notices during the planning process.

IV. Consultation: General Plan and Specific Plan Adoption or Amendment

Each time a local government considers a proposal to adopt or amend the general plan or specific plan, they are required to contact the appropriate tribes identified by the NAHC. If requested by tribes, local governments must consult for the purpose of preserving or mitigating impacts to cultural places. The following section provides basic guidance to local governments on the notification and consultation requirements in Government Code §65352.3.

What Triggers Consultation?

Government Code §65352.3 requires local governments to consult with tribes prior to the adoption or amendment of a general plan or specific plan proposed on or after March 1, 2005. Local governments should consider the following when determining whether a general plan or specific plan adoption or amendment is subject to notice and consultation requirements:

- In the case of an applicant-initiated plan proposal, if the local government receives a complete application on or after March 1, 2005, the proposal is subject to Government Code §65352.3.
- In the case of a general plan or specific plan amendment initiated by the local government, any amendment introduced for study in a public forum on or after March 1, 2005 is subject to Government Code §65352.3.

Only if a tribe is identified by the NAHC, and that tribe requests consultation, must a local government consult with the tribe on the plan proposal.

Identifying Tribes through the NAHC

Once a local government determines a proposal to adopt or amend its general plan or specific plan is subject to is subject to Government Code §65352.3, the local government should send a written request to the NAHC asking for a list of tribes with whom to consult. OPR recommends that the written request be sent to the NAHC as soon as possible. Local governments should consider the following points when submitting a request to the NAHC:

- All written requests should be sent to the NAHC via certified mail or by fax.
- Requests to the NAHC should include the specific location of the area that is subject to the proposed action, preferably with a map clearly showing the area of land involved.
- Requests should clearly state that the local government is seeking information about tribes that are on the “SB 18 Consultation List.”

- Contact information for the NAHC:

Native American Heritage Commission
915 Capitol Mall, Room 364
Sacramento, CA 95814
Phone: 916-653-4082
Fax: 916-657-5390

A sample format for submitting a request to the NAHC is provided in Exhibit A.

OPR encourages the NAHC to provide contact information within 30 days of receiving a request from the local government. The NAHC will provide local governments with a written contact list of tribes with traditional lands or cultural places located within the local government's jurisdiction. For each listed tribe, the NAHC will provide the tribal representative's name, name of tribe, address, and phone number (if available, fax and email address).

If the NAHC responds that no traditional lands or cultural places are affected by the general plan or specific plan amendment or adoption, the local government is not required to consult with any tribe. Local governments are not required by SB 18 to conduct consultations with tribes that are not on the NAHC's contact list.

Contacting Tribes Pursuant to Government Code §65352.3

Once a tribal contact list is received from the NAHC, local governments should contact the appropriate tribe(s) and invite them to participate in consultation. OPR suggests that local governments contact tribes as soon as possible upon receiving the tribal contact list. While statute does not specify by what means tribe(s) should be contacted, OPR suggests that local governments send a written notice by certified mail with return receipt requested. Sending a written notice does not preclude a local government from contacting the tribe by telephone or e-mail.

Notices should be concise, clear, and informative so that tribes understand what they are receiving. Notices sent from a local government to a tribe, inquiring whether consultation is desired, should contain the following information:

- A clear statement of purpose, inviting the tribe to consultation and declaring the importance of the tribe's participation in the local planning process.
- A description of the proposed general plan or specific plan being considered, the reason for the proposal, and the specific geographic area(s) that will be affected by the proposal. Relevant technical documents should be provided with a concise explanation that clearly describes out the proposed general plan or specific plan amendment and its potential impacts on cultural resources (if known).
- Maps that clearly detail the geographic areas described in the explanation. Maps should be in a reasonable scale with sufficient references for easy identification of the affected areas.

- The deadline (date) by which the tribe must request a consultation with the local government. By law, tribes have 90 days from the date of receipt of the notice to request consultation (Government Code §65352.3(a)(2)).
- Contact information for representatives of the local government to whom the tribe should respond.
- Contact information for the project proponent/applicant.
- Technical reports, including cultural resource reports and archaeological reports, if available.
- Information on proposed grading or other ground-disturbing activities, if applicable. (This may be included in the project description.)
- Any proposed mitigation measures or conditions of approval, if known.

After the information about a proposed plan or plan amendment is received by the tribe, local governments should cooperate to provide any additional pertinent information about the proposed plan or plan amendment that the tribe may request. The tribe's 90-day response deadline for requesting consultation is not automatically extended by a tribe's request for additional information.

Subject to confidentiality procedures, both parties should maintain clear records of communications, including letters, telephone calls, and faxes. Both parties may send notices by certified mail and keep logs of telephone calls and faxes. Any returned or unanswered correspondence should be retained in order to verify efforts to communicate. Documentation of notification and consultation requests should be included in the local government's public record. However, care should be taken to not include sensitive information about cultural places.

In addition to the above recommendations, local governments may develop notification procedures as a part of consultation protocols established in cooperation with a tribal government. (See Section VI.)

After Notification is Sent to the Tribe

Once local governments have sent notification, tribes are responsible for requesting consultation. Pursuant to Government Code §65352.3(a)(2), each tribe has 90 days from the date on which they receive notification to respond and request consultation. Some key points to consider:

- The time period for consultation (undefined) is independent of the time period for tribes to request consultation (90 days).
- Local governments should be aware that tribes may require the entire 90-day period allowed by law to respond to a consultation request. Tribal governing bodies may need to meet to take a formal position on consultation.
- Local governments and tribal governments may consider addressing the method and timing of a tribe's response to a consultation request in a jointly-developed consultation protocol.

- At their discretion, tribes can agree to a shorter timeframe (less than 90 days) to respond and request consultation.
- If the tribe does not respond within 90 days or declines consultation, consultation is not required.

Conducting Consultation on General Plan or Specific Plan Adoption or Amendment

Once a tribe requests consultation, both parties must begin consultation within a reasonable time for the purpose of preserving or mitigating impacts to cultural places. Consultation should focus on how the proposed general plan or specific plan amendment or adoption might impact cultural places located on land affected by the plan proposal. The objectives of consultation include:

- Identifying the location of cultural places.
- Understanding the nature and extent of cultural places.
- Identifying the appropriate methods for protecting, treating, and managing lands containing cultural places.
- Developing strategies to allow tribal access to cultural places.

Consultation places a responsibility upon both the tribe and local government to invest time and effort into reaching a mutually agreeable resolution of possible conflicts between a general plan or specific plan action and a cultural place. The requirement to consult does not impose an obligation to ultimately reach agreement. Government Code §65352.4 provides a definition of consultation for use by local governments and tribes:

Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the view of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

Effective consultation is an ongoing process, not a single event. The process should focus on identifying issues of concern to tribes – including cultural values, religious beliefs, traditional practices, and legal rights of California Native Americans – and on defining the full range of acceptable ways in which a local government can accommodate tribal concerns.

Items to Consider When Conducting Consultation

The following list identifies recommendations for how local governments and tribes may approach consultation on general plan and specific plan proposals.

- As defined in SB 18, consultation is to be conducted between two parties: the local government and the tribe.
- Consultation does not necessarily predetermine the outcome of the plan or amendment. Both parties to the consultation are required to carefully consider the views of others.

However, local governments are not obligated to change their plan proposals as a result of consultation.

- Local governments must consult with each tribe who is identified by the NAHC and requests consultation. The NAHC will identify whether there are, in fact, any tribes with whom the local government must consult due to the presence of cultural places within the local government's jurisdiction. One or more tribes may have traditional cultural ties to land within the local government's jurisdiction and have an interest in preserving cultural places on those lands. Therefore, local governments may have to consult with more than one tribe on any particular plan proposal. OPR recommends that local governments consult with tribes one at a time (individually).
- When a local government first contacts a tribe, its initial inquiry should be made to the tribal elected leader and a designated cultural resource representative, if known. OPR recommends that a local government department head or other official of similar or higher rank should make the initial contact.
- Local governments should be aware that simply notifying a tribe of a plan proposal is not the same as consultation.⁴
- Local governments should be aware of the potential for vast differences in tribal governments' level of staffing and other resources necessary to participate in the manner required by SB 18. Some may be able to respond more promptly and efficiently than others. Local governments should keep this in mind if and when developing a consultation protocol with a tribe. (*See Section VI.*)
- Local governments should be aware that the confidentiality of cultural places is critical to tribal culture and that many tribes may seek confidentiality assurances prior to divulging information about those sites. (*See Section VIII.*)
- Consultation is intended to accommodate religious considerations, rather than to endorse them.⁵ Local governments should be aware that a possible topic of discussion during consultation will be tribal access to and use of land where cultural places are located.
- Tribal consultation should be done face-to-face whenever possible. While in-person consultation is recommended, local and tribal governments may wish to define circumstances under which parts of the consultation process can be carried out via conference calls, e-mails, or letters. (*See Section VIII.*)
- Tribal consultations should not take place in a public forum, but rather be conducted in a setting that promotes confidential treatment of any sensitive information that is shared about cultural places.

⁴ In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), the court held that the U.S. Forest Service had not fulfilled its consultation responsibilities under the National Historic Preservation Act by merely sending letters to request information from tribes. The court ruling held that written correspondence requesting consultation with a tribe was not sufficient for the purpose of conducting consultation as required by law, and that telephone calls or more direct forms of contact may be required.

⁵ The courts have ruled that consultation regarding issues of Native American religious importance is not a violation of the Establishment Clause of the U.S. Constitution (113 Yale Law Journal, 1623, Page 2).

- Travel required for in-person consultation may be time-consuming, due to the rural location of a tribe. The local government should make an effort to travel to the tribe, rather than expecting the tribal representative to come to the local government's offices.
- The local government should offer a meeting location at the city hall, county administrative building, or the site of the plan proposal. Local governments should be open to a tribe's invitation to meet at tribal facilities.
- Government leaders of the two consulting parties may consider delegating consultation responsibilities (such as attending meetings, sharing information, negotiating the needs and concerns of both parties, etc.) to staff. Representatives to whom such tasks may be delegated should maintain direct relationships with and have ready access to their respective government leaders. These individuals may, but are not required to, be identified either in a jointly-developed consultation protocol or in official letters exchanged between the leaders of the local and tribal governments. *(See Section VI.)*
- A local government should not assign consultation responsibilities to a contractor or developer. A local government also should not assign primary consultation responsibilities to a lawyer or consultant, although inclusion of lawyers or consultants in the consultation process is not prohibited.
- If the consultation involves private landowners, by mutual invitation by the consulting parties, local agencies may encourage participation by the property owner.
- Local governments are encouraged to establish a collaborative relationship with tribes as early as possible, prior to need to consult on general plan or specific plan amendment or adoption. Local governments may consider conducting pre-consultation meetings and developing consultation protocols in cooperation with tribes. *(See Section VI.)*
- Both parties should attempt to document the progress of consultation, including letters, telephone calls, and direct meetings, without disclosing sensitive information about a cultural place. Local governments may also want to document how the local government representative(s) fulfilled their obligation under Government Code §65352.4, including: how each of the tribe's concerns was considered, the efforts made to seek agreements, areas of mutual agreement, and any reasons why agreement could not be reached.

When is Consultation Over?

Alan Downer, of the Advisory Council on Historic Preservation, described consultation as “conferring between two or more parties to identify issues and make a good faith attempt to find a mutually acceptable resolution of any differences identified.”⁶ Differences of opinion and of priorities will arise in consultation between local and tribal governments. Whenever feasible, both local and tribal governments should strive to find mutually acceptable resolutions to differences identified through consultation.

When engaging in consultation, local and tribal representatives should consider leaving the process open-ended to allow every opportunity for mutual agreement to be reached. Some

⁶ From The Navajo Nation Model: Tribal Consultation Under the National Historic Preservation Act (2000)

consultations may involve highly sensitive and complex issues that cannot be resolved in just one discussion. Consultation may require a series of meetings before a mutually acceptable agreement may be achieved.

Consultation, pursuant to SB 18, should be considered achieved at the point in which:

- the parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or
- either the local government or tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning appropriate measures of preservation or mitigation.

V. Consultation: Cultural Places Located in Open Space

If land is designated, or proposed to be designated, as open space on or after March 1, 2005, and if that land contains a cultural place and if an affected tribe has requested notice of public hearing under Government Code §65092, then local governments must consult with the tribe. The purpose of this consultation is to determine the level of confidentiality required to protect the specific identity, location, or use of the cultural place, and to develop dignified treatment of the cultural place in any corresponding management plan (Government Code §65562.5). This consultation provision does not apply to lands that were designated as open space before March 1, 2005.

What Triggers Consultation?

Government Code §65562.5 applies to land that is designated, or proposed to be designated, as open space, on or after March 1, 2005. Local governments must consider several criteria when determining whether consultation is required, prior to designating open space on or after March 1, 2005.

First, local governments must determine whether the land designated, or proposed to be designated, as open space contains a cultural place. The following are methods by which local governments may be informed if a cultural place is located on designated or proposed open space:

- Conduct record searches through the NAHC and CHRIS to determine if any cultural places are located on land proposed to be designated as open space. The local government should provide maps of lands proposed as open space to the NAHC and CHRIS, with a request to identify whether there are any cultural places on the property. This does not mean that the NAHC or CHRIS will provide detailed information regarding the character or location of the cultural place, only that one or more may be present. A negative response to these searches does not preclude the existence of a cultural place, because some cultural places are only known through oral history.
- Request that tribes identify the existence of any cultural places on the proposed open space land. Local governments should send a written request to the NAHC asking for a list of tribes that have traditional cultural ties to the proposed open space. The NAHC will provide tribal contact information. Local governments should contact each tribe on

the list provided by the NAHC to determine if any cultural places are located on the land proposed as open space. Local government should provide the tribe with a map of the open space along with a concise notice as to why the tribe is being contacted. (Note: This contact is sent strictly for the purpose of identifying whether a cultural place is located on the proposed open space land. It does not start consultation with a tribe.)

If the land designated, or proposed to be designated, as open space does not contain any cultural places, there is no requirement to consult.

After a local government determines that a cultural place is located on land designated or proposed to be designated as open space, the local government must notify the appropriate tribes of the opportunity to participate in consultation. The appropriate tribes are those which have: (1) been identified by the NAHC, and (2) requested notice of public hearing from the local government pursuant to Government Code §65092. A local government does not have to consult with a tribe, for the purpose of Government Code §65562.5, unless the tribe is identified by the NAHC and has requested public hearing notice from the local government.

Conducting Consultation Regarding Open Space

The purpose of this consultation is to determine the level of confidentiality needed to protect the cultural place and to develop appropriate treatment of the cultural place in any corresponding open space management plan. The reference to “any corresponding management plan” is not meant to imply that there is such a plan or that the local government must develop such a management plan. This language is intended to encourage consideration of management policies or practices (plan) which may be discussed between the local government and tribe.

The following items are appropriate to consider and discuss during consultation:

- Encourage tribal involvement in the treatment and management of the cultural place through contracting, monitoring, co-management, and other forms of joint local-tribal participation.
- Tribes may only wish to disclose a sufficient amount of information to protect the site and to allow for the proper treatment and management of the cultural place. (*See Section VIII.*)
- Tribes may wish to have access to cultural places located on open space, to perform ceremonies and/or to help maintain the site.
- Tribes may want to recommend management practices that avoid disturbing or impacting the cultural place.
- Tribes may wish to discourage certain land uses (e.g. recreation) within the open space that could adversely impact the cultural place. Local governments may be asked to consider appropriate land uses in the open space designation that would avoid direct impacts to the cultural place.

For proposals to designate land as open space that also require a general plan or specific amendment, the local government should follow the above recommendations as well as the procedures outlined in Section IV of these guidelines.

SB 18 does not mandate local review or revision of the open space element of the general plan to incorporate cultural site designation, pursuant to new Government Code §65560(b)(5). However, local governments should consider doing so in future updates of or revisions to the open space element.

When is Consultation Over?

Please refer to Section IV (Consultation: General Plan and Specific Plan Adoption or Amendment) for additional information regarding the meaning of consultation.

Part C

Suggested Protocols and Other Recommendations

Sections VI through X provide advice to local governments that is intended to help them more effectively engage in consultation with tribes. This portion of the 2005 Supplement provides information that will help local governments as they consider issues such as appropriate means to preserve and/or mitigate impacts to cultural places, methods to protect the confidentiality of cultural places, and ways to encourage the participation of landowners in voluntary preservation efforts.

VI. Suggested Protocols for Consultation

As discussed above, SB 18 requires consultation during the process of amending or adopting general plans or specific plans. In addition, SB 18 requires consultation to determine the proper level of confidentiality to protect a cultural place and to treat a cultural place with dignity in any corresponding management plan, where such places are located on lands to be designated as open space. Before undertaking consultation in either of these cases, OPR recommends that local governments develop relationships with tribes that have traditional lands within their jurisdiction. Taking steps to develop an initial foundation for a mutually respectful and cooperative relationship can help to ensure more smooth and effective communication in future consultations between the local governments and tribes.

Although not required by law, local governments are encouraged to prepare for tribal consultation by arranging pre-consultation meetings with each tribal government with whom they have a requirement to consult under SB 18. These meetings may provide the opportunity for local governments and tribal governments to establish mutually agreeable protocols for use when consulting with each other. The following steps are suggestions for pre-consultation meetings:

- Local governments should initially contact the NAHC in writing to obtain a list of all appropriate tribes with whom to pre-consult.
- Local governments should contact the NAHC and the California Historic Resources Information System (CHRIS) to learn if any listed historical or cultural places are located within their jurisdictions. (Note: Not all cultural places are recorded.)
- Local governments should invite tribal government leaders of each tribe to meet with elected local government leaders for the purpose of establishing working relationships and discussing the requirements of SB 18. Local governments should meet with one tribe at a time. Local governments should not expect or ask a tribe to share confidential information in a meeting with other tribes.
- In addition to individual meetings with each tribe, local governments may also consider holding informational workshops or meetings with all tribes in the area to discuss the existing general plan and any contemplated amendments.

- Both parties should attempt to exchange information about their respective governmental structures, practices, and processes. Discussion may also cover community goals, planning priorities, and how cultural places play a role in the tribal culture. Local governments may also want to provide an overview of the general plan process and the laws/regulations applicable to local government and to land controlled by private party owners.
- Once a government-to-government relationship has been established, local government and tribal government leaders may decide to develop a consultation protocol that addresses how the cooperative relationship will be maintained and how future consultations should be conducted. Some tribes may already have established protocols through working with other agencies, such as state and federal entities, that can be helpful models for addressing the specific requirements of SB 18.

If the tribe and local government decide to develop a consultation protocol, it may be useful to consider the following suggestions for inclusion in the protocol.

- Designate representative(s) to manage consultations and the information resulting from the consultations. In identifying such representatives or liaisons, the local governments and tribal governments should consider the expertise and knowledge of the person with respect to preservation of cultural places. It is recommended that local governments identify a single consultation representative for consistency and relationship building. Representatives should have access to their respective decision-makers.
- Identify when elected government leaders need to be directly involved. Elected leaders hold responsibility for making final decisions on behalf of their respective governments and may wish to meet together at key points in the consultation process.
- Develop procedures, in consultation with the tribe, for the local government to notify tribes regarding proposed general plan or specific plan amendments or updates, including:
 - Other persons that the tribe wishes the local government to contact regarding a proposed action, in addition to the tribe's designated contact person.
 - Method(s) of contact preferred by the tribal government. (Note: Some tribes only have P.O. boxes, which do not accept Federal Express deliveries.)
 - Information that should be included in the notice.
 - Procedures that the tribe may follow to answer each notice, including method and timing.
- Identify preferred method of consultations. While in-person consultation is recommended, local and tribal governments may permit consultation to also occur through conference calls, e-mails, or letters.
- Identify locations of consultation meetings. Meetings may be held in local and tribal government settings or facilities.
- Maintain accurate contact information. Each government should ensure that contact information is updated on a regular basis. Meetings may be appropriate to introduce any

new contact persons, particularly when a transition of elected government leaders occurs. Local governments should also contact the NAHC regularly for updated tribal contact information.

- Develop maps that detail the regions within the local government’s jurisdiction in which a tribe has a general interest. Based on information from each tribal government, local governments may consider developing maps that identify the regions in which the tribe has an interest. The development of such maps must recognize the need to maintain confidentiality.
- Investigate combined consultation options. Local governments should determine the willingness of each tribe to participate in combined consultation, should a specific site be of interest to more than one tribe.
- Share information. Local governments should allow each tribal government to have access to the local government’s consultation records.
- Make recommendations, based on each consultation, known to the tribe. Part of the consultation process should include a way for the local government to explain to the tribe how each of the tribe’s concerns has been addressed and the rationale for the local government’s final recommendations.
- Update consultation protocol. Over time, the approach to consultation may need to be updated. Both parties should mutually agree on changes to their consultation protocol.

VII. Mitigation of Impacts and Preservation of Cultural Places

SB 18 requires local governments to conduct consultations with tribes (when requested) for the purpose of “preserving or mitigating impacts” to California Native American cultural places. In the course of adopting or amending a general plan or specific plan, local governments may be informed of the existence of a cultural place within the affected area. Should a tribe request consultation to discuss any impacts to the site, local governments should consider a variety of factors when participating in the consultations, including: the history and importance of the cultural place, the adverse impact the local government action may have on the site, and all available methods of mitigation that may aid in the ongoing preservation of the site.

When participating in consultations, it is important that local governments consider that, because of philosophical differences, mitigation will not always be viewed as an appropriate option to protect cultural, and often irreplaceable, places. Many tribes may determine that impacts to a cultural place cannot be mitigated; that the only appropriate treatment may be to avoid and preserve the cultural place without impact to its physical or spiritual integrity. Of course, this is not to say that tribes will not engage in discussions regarding mitigation of impacts to their cultural places, but local governments should consider the vastly different perspectives that a tribe may have. What a local government may consider to be acceptable treatment under current environmental, land use, and cultural resource protection laws, may not be considered by a tribe to be acceptable treatment for a sacred or religious place.

What is Preservation and Mitigation?

With regard to cultural places, preservation is the conscious act of protecting a historical and sacred area from adverse impacts including loss or harm. Mitigation, on the other hand, is the act of moderating the adverse impacts that general plan or specific plan adoption or amendment may have on a cultural place. While local governments should strive to help preserve the physical integrity, access, and use of cultural places, preservation may often be attempted through a broad range of mitigation measures. Although SB 18's consultations are not in any way subject to the California Environmental Quality Act (CEQA), certain sections of the CEQA Guidelines' definition for "mitigation" (California Code of Regulations §153771) may offer local governments some insight as to the range of mitigation options available:

- Avoiding the impact altogether by not taking a certain action or parts of an action.
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the impacted [site].
- Reducing or eliminating the impact over time by preservation and maintenance [of the site].

Other methods of mitigation may include:

- Designation of open space land in accordance with Government Code §65562.5.
- Development of habitat or open space properties.
- Development of an alternate site suitable for tribal purposes and acceptable to the tribe.
- Monitoring or management programs.
- Other alternative means of preserving California Native American cultural features, where feasible.

It is important that local governments consider that mitigation measures may largely differ depending on customs of a particular tribe, the characteristics and uses of a site or object, the cultural place's location, and the importance of the site to the tribe's cultural heritage. Consultations with tribes should be directed towards mitigating for the specific site in question that may be impacted by the general plan or specific plan adoption or amendment being proposed.

Places, Features, and Objects

SB 18 was intended to not only apply to "sacred sites," but also to other cultural places, features, and objects as described in §5097.9 and 5097.995 of the Public Resources Code.⁷ Prior to entering into consultations, local governments should consider the depth of SB 18, and the

⁷ Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

multitude of California Native American places and artifacts it seeks to protect. As a reminder, the definition of cultural places is broad and can include:

- Prehistoric and historic places of tribal habitation and activity – village sites, burial grounds, and ceremonial sites.
- Places or sites associated with creation stories or other significant historical incidences.
- Artifacts associated with California Native American prehistoric and historic places.
- Collection or gathering sites – specific places where California Native Americans access certain plants or animals for food, clothing, ceremonial objects, and basket making.
- Structures, inscriptions, artwork, and geographical features with religious significance.
- Places of worship.

Mitigation “Where Feasible”

Although SB 18 contemplates consultation for the purpose of preserving or mitigating against the adverse impacts that a general plan or specific plan adoption or amendment may have on a cultural place, it is important that local governments recognize the absence of a requirement to avoid a cultural place or adopt mitigation measures if agreement cannot be reached. Under SB 18’s definition of “consultation” (Government Code §65352.4), government agencies and tribes are required to carefully consider the views of others and are required to seek an agreement, “where feasible.” For the purposes of SB 18, agreements should be considered “feasible” when an avoidance or mitigation measure exists that is capable of being accomplished, and is acceptable to the needs of all parties involved in the consultation. If, after conducting consultations in good faith and within the spirit of the definition, the tribe or local government cannot reach agreement for mitigation or avoidance of any impact to a California Native American cultural place, neither party is required to take any action under SB 18.

Monitoring and Management

During consultations, local governments should consider, as a possible mitigation measure, the involvement of tribes in the ongoing treatment and management of cultural places, objects, or cultural features through a specific monitoring program, co-management, or other forms of participation.

Where a cemetery, burial ground, or village site may be present, the planning of treatment and management activities should address the possibility that California Native American human remains may be involved when protecting cultural features. Local governments should consider working with tribes to develop an appropriate plan for the identification and treatment of such discoveries in accordance with Public Resources Code §5097.98.

Mitigation and Private Landowner Involvement

During a proposed general plan update or amendment, a local government may discover or be informed of a cultural place that exists on privately owned land within an affected area. In such an instance, local governments should first contact the appropriate tribe or tribes to offer consultations and determine an acceptable level of landowner involvement, if any. Local

governments should be aware that there may be some occasions where a tribe may prefer to maintain strict confidentiality without the inclusion of a private, third party landowner.

Where a tribe is open to private landowner participation, local governments should encourage the involvement of private landowners and consider offering tribes their assistance to facilitate such involvement. Private landowner participation can be accomplished in a number of ways subject to the concerns of a tribe. It is important that local governments and tribes understand that there is no statutory requirement to include private landowners in SB 18's government-to-government consultations. However, because landowner participation is highly encouraged, local governments may consider suggesting the following methods to facilitate landowner involvement:

- Suggesting that the tribe contact the private landowner directly to facilitate discussions between the tribe and landowner.
- Offering to contact the private landowner directly on behalf of the tribe.
- Suggesting that the private landowner be included as a party to the consultations.

VIII. Confidentiality of Information

Confidentiality, with regard to information concerning a cultural place, is of paramount importance. By maintaining the confidentiality of a cultural place, including its location, traditional uses, and characteristics, local governments can help assure tribes of continued access and use of these cultural places, in addition to aiding in the preservation of a cultural place's physical integrity, wherever possible.

Public Disclosure Laws

The California Public Records Act (Government Code §6250 et. seq.) and California's open meeting laws applying to local governments (The Brown Act, Government Code §54950 et. seq.) both have implications with regard to maintaining confidentiality of California Native American cultural place information. Local governments are encouraged to carefully consider the laws in greater detail below, and adopt or incorporate these recommendations into their own confidentiality procedures in order to avoid the unintended disclosure of confidential cultural place information.

The California Public Records Act (CPRA)

Subject to specified exemptions, the CPRA provides that all written records generated by local or state government are public documents and are to be made available to the public, upon request. Written records include all forms of recorded information (including electronic) that currently exist or that may exist in the future. The CPRA requires government agencies to make records promptly available to any citizen who asks.

While the CPRA does exempt certain types of information from public disclosure, the law is presently unclear as to whether a public agency would be required to disclose records (written and in a local government's possession) pertaining to cultural places under a CPRA request. However, federal and state laws do impose significant restrictions on the maintenance, use, and

disclosure of records and information pertaining to tribal cultural places. Mindful of these restrictions, and our state's guarantee that access to information concerning the conduct of the people's business is a fundamental right of every person in California, and that any exceptions to disclosure are narrowly construed,⁸ we believe that public records concerning the nature and specific location of a tribal cultural place should be disclosed by a local agency in response to a request under Government Code §6250 unless the local agency makes a written determination that:

1. disclosure of the information would create an unreasonable risk of harm, theft, or destruction of the resource or object, including individual organic or inorganic specimens; or
2. disclosure is inconsistent with other applicable laws protecting the resource or object; or
3. in accordance with Government Code §6255 on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

The Brown Act

The Brown Act governs the legislative bodies of all local agencies within California. It requires that meetings held by these bodies be “open and public.” Under this Act, no local legislative body may take an action in secret, nor will the body’s action be upheld if it is in violation of California’s open meeting laws. The Brown Act defines a “meeting” as a gathering of a majority of the members of a applicable body to hear, discuss, or deliberate on matters within the agency’s or board’s jurisdiction.

While the Brown Act does contain some exceptions for “closed meetings,” none of these exceptions would allow the quorum of a local legislative body to participate in tribal consultations within a closed meeting. Should a local legislative body wish to participate in confidential tribal consultations, it is important that they do so as an advisory committee with *less than* a quorum, so as to not invoke the Brown Act’s requirements of public participation (see Government Code §54952(b)). Otherwise, the Brown Act will require that the consultations be held in public, thereby defeating the purpose of confidentiality, or, alternatively, any decisions made by the quorum of the body within a closed meeting would be rendered invalid.

In order to efficiently conduct tribal consultation meetings, in addition to maintaining confidentiality at all times, local governments are encouraged to develop procedures in advance that would designate a group or agency in charge. In doing so, local governments should consider the consequences of elected official participation within tribal consultations, and should tailor their procedures accordingly.

⁸ See California Constitution, Article I, Section 3, Subdivision (b)(2); and *County of Los Angeles v. Superior Court (Axelrad)*, 82 Cal.App.4th 819 (2000).

Additional Confidentiality Procedures

Additionally, local governments should consider the following items when considering steps to be taken in order to maintain confidentiality:

- Local governments should develop “in-house” confidentiality procedures.
- Procedures should be established to allow for tribes to share information with local government officials in a confidential setting.
- Only those tribal designees, planning officials, registered professional archaeologists, and landowners involved in the particular planning activity should obtain information about a specific site.
- Participating landowners should be asked to sign a non-disclosure agreement with the appropriate tribe prior to gaining access to any specific site information.
- Possible procedures to require local government to notify participating tribes and landowners whenever records containing specific site information have been requested for public disclosure.

Local governments should also keep in mind that the terms for confidentiality may differ depending upon the nature of the site, the tribe, the local government, the landowner, or who proposes to protect the site. Local governments should collaborate with tribes to develop informational materials to educate landowners regarding the cultural sensitivity of divulging site information, explaining the tribe’s interest in maintaining the confidentiality and preservation of a site. Landowners should be informed of criminal penalties within the law for the unlawful and intentional destruction, degradation or removal of California Native American cultural or spiritual places located on public or private lands (Public Resources Code §5097.995).⁹

Confidentiality Procedures for Private Landowner Involvement

In order to successfully mitigate against or avoid impacts to a California Native American cultural site, local governments and tribes may often find it essential to involve private landowners early in the consultation process. Often, landowners may not be aware that a cultural place exists on their property, or alternatively, may not realize that the site has become subject to a General Plan adoption or amendment. Due to the confidential nature of the information involved, local governments should consider working with tribes to adopt procedures that would balance the need for landowner involvement with the need for cultural place confidentiality. Local governments and California Native American tribes may wish to consider the following procedures that would inform and potentially involve landowners in the consultation process, but would not compromise the general confidentiality of a cultural place:

- Local governments, at the request of a tribe, may consider contacting a landowner directly and, without disclosing the exact location or characteristics of the site, inform the landowner of the existence of a culturally significant place on their property. A local

⁹ Due to a drafting error, SB 18 contains multiple references to Public Resources Code (PRC) §5097.995 which is no longer in existence. In 2004, PRC §5097.995 was amended and renumbered to PRC §5097.993 by Senate Bill 1264 (Chapter 286). Local governments should refer to PRC §5097.993 when looking for PRC §5097.995.

government may consider inquiring as to whether the landowner would be willing to further discuss the matter directly with the appropriate tribal representative under a non-disclosure agreement.

- Through conducting a records search, local governments may consider giving the landowner's contact information to a tribe so that the tribe may contact the landowner directly if local government involvement is not desired.
- Local governments may also wish to consider informing landowners of the CHRIS system, and their right, as landowners, to utilize the database for further information concerning the cultural place on their property. Local governments should keep in mind that the CHRIS system does not contain a catalog of all cultural places within California, and may not have information with regard to a particular site.

IX. Procedures to Facilitate Voluntary Landowner Protection Efforts

In addition to their own consultation with tribes, local governments can help facilitate landowner participation in preserving and protecting cultural places. While each city and county should develop its own procedures, general strategies for encouraging landowner awareness of and participation in cultural place protection may include:

- Collaborating with local tribes to offer cultural sensitivity training and other educational events for landowners.
- Encouraging landowner participation in discussions about appropriate mitigation or avoidance measures.
- Promoting the use of conservation easements and other private conservation efforts.

It should be noted that SB 18 does not require landowners to dedicate or sell conservation easements for the purpose of cultural place preservation. SB 18, however, does require OPR to recommend procedures to facilitate voluntary landowner participation in the preservation and protection of cultural places. In addition, local governments are not required to play a direct role in any private conservation activity.

Landowner Education and Participation

As an initial strategy to promote landowner awareness of issues related to preservation, local governments should consider initiating or co-sponsoring cultural sensitivity trainings for landowners. In order to protect the confidentiality of information concerning a specific cultural place, educational sessions should focus on developing basic landowner awareness of tribal culture and cultural place preservation. Public workshops, seminars, and other educational sessions can provide forums for tribal representatives to share tribal and cultural information and discuss general protection concerns with landowners. These sessions can build cultural awareness, develop landowner understanding of cultural places, and may also encourage further dialogue between tribes and landowners.

Local governments may also encourage landowner participation in discussions about mitigating or avoiding any impact to a cultural place located on a landowner's private property. Please

refer to “Mitigation and Private Landowner Involvement” in Section VII and “Confidentiality Procedures for Private Landowner Involvement” in Section VIII for further information.

Private Conservation Efforts

Although local governments are not required to play a direct role in any private conservation activity, they can promote the use of conservation easements and other conservation programs to protect cultural places. Local governments may consider passage of a policy statement to encourage voluntary landowner participation in protection programs. Informational materials about potential incentives for private conservation efforts, such as Mills Act tax credits or the tax benefits of donating or selling conservation easements, may also be developed and distributed by local governments.

A conservation easement is a voluntary agreement with a state or local government agency, non-profit organization, or tribe that allows the holder to limit the type or amount of development on the property while the landowner retains private ownership of the land. Conservation easements ensure that certain types of development will be limited or prohibited, while the landowner is compensated for lost development opportunities. The easement is binding upon successive owners of the land. Granting of a conservation easement may qualify as a charitable contribution for tax purposes.

Civil Code §815.3(c) already allows a state or local government agency or non-profit organization to acquire and hold perpetual easements for the preservation of land in its natural, scenic, agricultural, historical, forested, or open space condition. SB 18 amends the section to enable tribes to acquire conservation easements to protect a cultural place, if the conservation easement is voluntarily conveyed. The right to hold conservation easements provides for the continued protection of cultural places, while also ensuring tribal access to these sites. If selling conservation easements, landowners and local government should consult with all tribes affiliated with the territory in which the easement is proposed. It is also recommended that tribes hold conservation easements only within their areas of cultural affiliation.

As an alternative to conservation easements, local governments may also promote private preservation of cultural places through the use of a Memoranda of Understanding (MOU). As a direct agreement between a landowner and tribe, a MOU allows a tribe and landowner to make site-specific rules and exempt a landowner from more general rules. MOUs may clarify treatment of cultural places located on the landowner’s private property and give certain privileges to tribes, such as access to perform ceremonial rituals. MOUs may also be used to facilitate co-management by tribes, landowners, and agencies. For example, if a conservation easement established for wildlife protection also contains a cultural place, the landowner, conservation entity, and tribe could develop a co-management agreement that protects both the habitat and cultural place.

X. Open Space for the Protection of Cultural Places

SB 18 amends Government Code §66560 to include open space for the protection of cultural places as an allowable purpose of the open space element. Local governments may, but are not required to, consider adopting open space policies regarding the protection of cultural places. Local governments may wish to consider the following when and if they develop such policies:

- Limiting the types of land uses allowed in an open space designation in order to protect the cultural place from potentially harmful uses.
- Allowing access to tribes for maintenance and use of cultural places.
- Protecting the confidentiality of cultural places by not disclosing specific information about their identity, location, character, or use.
- Giving developers incentives to protect cultural places through voluntary designation of sites as open space in development proposals.
- Including open space in appropriate regional habitat conservation and protection programs, as may be identified in a local or regional Habitat Conservation Plan (HCP) or Natural Community Conservation Program (NCCP).
- Reviewing and conforming other elements of the general plan that deal with conservation of resources and land use designations to the open space element (conservation element, land-use element).

The development of open space policies for the protection of cultural places should be done in consultation with culturally-affiliated tribes. It is important to note that the importance of cultural places is not solely rooted in the land or other physical features or objects related to the land on which the cultural place is located. The sense of “place” is often as important as any physical or tangible characteristic. It may be important to a tribe to preserve a certain non-material aspect of a cultural place, such as views or vantage points from or to the cultural place. Cultural interpretation and importance of the place to the tribe should be taken into consideration, in addition to the archaeological importance of the place. With this in mind, local governments should be prepared to consider creative solutions for preservation and protection of cultural places.

Part D

Additional Resources

XI. Additional Resources

In addition to the information provided in the 2005 Supplement to the *General Plan Guidelines*, local governments may wish to investigate additional resources that can provide more detailed information about Native American people, cultural places, tribal governments, consultation, confidentiality, conservation easements, and other issues related to SB 18. Sources of additional information include federal and state government agencies that have previous experience with tribal consultations, colleges and universities, private organizations and foundations, and the literature and web sites associated with these groups.

Of course, local governments are encouraged to obtain information from the tribes themselves.

Federal Agencies

Federal Highway Administration – AASHTO (American Association of State Highway and Transportation Officials) Center for Environmental Excellence

The AASHTO Center for Environmental Excellence provides a web site designed to provide tools for Section 106 of the National Historical Preservation Act (NHPA) tribal consultation. This site contains documents and links to web sites that address key aspects of tribal consultation relevant to SB 18. Information also includes federal, tribal, and state policies and protocols, case law, and best practices as implemented by federal and state agencies and tribes.

http://environment.transportation.org/environmental_issues/tribal_consultation/overview.htm

U.S. Army Corps of Engineers

The U.S. Army Corps of Engineers has lasting and positive relations with many tribal governments. The “Tribal Affairs and Initiatives” section of their web site provides information regarding the U.S. Army Corps of Engineers’ approach to tribal consultation and preservation of cultural resources.

<http://www.usace.army.mil/inet/functions/cw/cecwp/tribal/index.htm>

USDA Forest Service

Because many National Forest System lands are adjacent to tribal lands, the Forest Service has extensive relationships with Native American tribes. The Forest Service’s *Forest Service National Resource Book on American Indian and Alaska Native Relations* is an excellent resource book on tribal beliefs and practices, tribal consultation, and laws affecting Native Americans. The Forest Service’s *Report of the National Tribal Relations Program Implementation Team* (June 2003) reviews relationships between the Forest Service and tribes, identifying pervasive problems and concerns and making recommendations to improve the effectiveness of the program at maintaining long-term collaborative relationships with tribal governments.

USDA Forest Service
Regional Office of Tribal Relations
Sonia Tamez
1323 Club Drive
Vallejo, CA 95492
Phone: (707) 562-8919
www.r5.fs.fed.us

USDA National Sustainable Agriculture Information Service (ATTRA)

The ATTRA provides information and other technical assistance to farmers, ranchers, Extension agents, educators, and others involved in sustainable agriculture in the United States. The ATTRA publication, *Conservation Easements, Resource Series (2003)*, provides an overview of what holding and selling conservation easements entail.

ATTRA - National Sustainable Agriculture Information Service
PO Box 3657
Fayetteville, AR 72702
Phone: (800) 346-9140
Fax: (479) 442-9842
<http://attra.ncat.org/>

USDA Natural Resources Conservation Service (NRCS)

The mission of the NRCS is to address natural resource conservation on private lands. The web site contains links to various conservation technical resources and to additional contact information for area offices and service centers.

California NRCS State Office
430 G Street #4164
Davis, CA 95616-4164
Phone: (530) 792-5600
Fax: (530) 792-5610
<http://www.ca.nrcs.usda.gov/>

U.S. Department of Interior – Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure, and economic development are all agency responsibilities. The BIA web site includes links to other federal agencies, inter-tribal organizations, environmental organizations, and cultural resources.

Bureau of Indian Affairs
Phone: (202) 208-3710
<http://www.doi.gov/bureau-indian-affairs.html>

U.S. Department of Interior – Bureau of Land Management

The Bureau of Land Management manages 261 million acres of land and has staff whose duties include coordination and consultation with Native Americans. The Bureau publishes *Native American Coordination and Consultation, Manual Section 8160 with Handbook H-8160-1*. The handbook is devoted to providing general guidance for tribal consultation, and can be found online at: <http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html>.

Bureau of Land Management
California State Office
2800 Cottage Way, Suite W-1834
Sacramento, CA 95825-1886
Phone: (916) 978-4400
Phone: (916) 978-4416
TDD: (916) 978-4419
<http://www.ca.blm.gov/>

U.S. Department of Interior – Office of Collaborative Action and Dispute Resolution

This web site provides links to federal agencies' policies on tribal consultation:
<http://mits.doi.gov/cadr/main/G2GAgencyPolicies.cfm>

State Agencies

California Department of Conservation

Division of Land Resource Protection (DLRP)

The DLRP works with landowners, local governments, and researchers to conserve productive farmland and open spaces.

California Department of Conservation
Division of Land Resource Protection
801 K Street, MS 18-01
Sacramento, CA 95814-3528
Phone: (916) 324-0850
<http://www.consrv.ca.gov/DLRP/index.htm>

California Department of Housing and Community Development

California Indian Assistance Program (CIAP)

The California Indian Assistance Program's primary role is to assist tribal governments with obtaining and managing funds for community development and government enhancement. CIAP's *2004 Field Directory of the California Indian Community* is a good reference for California Native American tribes, including location of Indian lands, federal recognition status of tribes, history of laws affecting tribes, and other programs and agencies involved in tribal relationships.

California Indian Assistance Program
1800 Third Street, Room 365
Sacramento, CA 95814
Phone: (916) 445-4727
<http://www.hcd.ca.gov/ca/ciap/>

California Department of Transportation (DOT)

Native American Liaison Branch

The California DOT administers most of its projects with some federal funding and is therefore subject to Section 106 consultation requirements under NHPA. The department has a Native American Liaison Branch (NALB), with headquarters in Sacramento and Native American Liaisons in each of its twelve districts. The NALB web site contains policy statements and links to other useful resources.

Office of Regional and Interagency Planning

Native American Liaison Branch

1120 N Street, MS 32

Sacramento, CA 95814

Phone: (916) 651-8195

Phone: (916) 654-2389

Fax: (916) 653-0001

http://www.dot.ca.gov/hq/tpp/offices/orip/na/native_american.htm

California Native American Heritage Commission (NAHC)

The NAHC is the state commission responsible for preserving and protecting Native American human remains and cultural resources. The NAHC maintains a list of California tribes and the corresponding contacts that local governments should use for the purpose of meeting SB 18 consultation requirements. The NAHC web site also provides a number of links to information about federal and state laws, local ordinances and codes, and cultural resources in relation to Native Americans.

Native American Heritage Commission

915 Capitol Mall, Room 364

Sacramento, CA 95814

Phone: (916) 653-4082

Fax: (916) 657-5390

<http://ceres.ca.gov/nahc/default.html>

California Office of Historic Preservation (OHP)

California Historical Resources Information System (CHRIS)

CHRIS is the name given to a statewide system for managing inventory information related to historical (cultural) resources in California. This inventory includes the statewide Historical Resources Inventory (HRI) database maintained by OHP and the records maintained and managed, under contract, by independent regional Information Centers (ICs). Under CHRIS, historical resources include both archaeological sites and built structures. Three key functions of the CHRIS are to: 1) provide archeological and historical resources information, on a fee-for-service basis, to local governments and individuals with responsibilities under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the California Environmental Quality Act (CEQA), as well as to the general public; 2) integrate newly recorded sites and information on known resources into the California Historical Resources Inventory; and 3) provide a wide range of information services to historic preservation

clients. This system assures standardization in the recordation of historic resources as well as continuity in service to historic preservation clients.

Individuals and government agencies seeking information on cultural and historical resources should begin their research by contacting their regional Information Center. Due to the confidential nature of much of the information involved, access to CHRIS archaeological records and information is presently limited to landowners seeking information regarding their own property and individuals who meet certain federal or state professional qualification standards as listed in the California Historical Resources Information System Information Center Procedural Manual (1995), posted on OHP's web site. Organizations or government agencies (e.g., city and county governments) that have entered into a Memorandum of Agreement with an IC may obtain summary, non-specific information regarding archaeological resources.

Local governments wishing to obtain historical resource information from CHRIS should contact their regional IC to inquire about access to CHRIS information, including summary information regarding archaeological resources, and to receive recommendations concerning historical resource concerns. According to CHRIS policy, only qualified individuals eligible to obtain CHRIS archaeological information will be allowed access under an "Agreement of Confidentiality" between the information requestor and the appropriate IC.

CHRIS operates through 12 Information Centers in California and the Office of Historic Preservation in Sacramento. The IC Roster available through the OHP web site identifies the locations of, contact information for, and counties served by each regional IC.

The OHP also provides assistance to local governments to encourage direct participation in historic preservation. OHP provides technical assistance to local governments including training for local commissions and review boards, drafting of preservation plans and ordinances, and developing archaeological and historical surveys.

Office of Historic Preservation
P.O. Box 942896
Sacramento, CA 94296-0001
Phone: (916) 653-6624
Fax: (916) 653-9824
<http://www.ohp.parks.ca.gov>

Colleges and Universities

Humboldt State University

The Center for Indian Community Development (CICD)

The CICD primarily focuses on Indian language education, but also acts in the capacity of a liaison between Native American tribes and the community. The CICD includes a cultural resource facility where information about Native American burial grounds and cultural resource monitoring can be found. The CICD offers useful publications on tribal governments and cultural approaches to environmental protection of Native American lands on its web site.

Humboldt State University
Center for Indian Community Development
#1 Harpst Street
Arcata, CA 95521
Phone: (707) 826-3711
<http://www.humboldt.edu/~cicd/>

**University of California, Los Angeles
American Indian Studies Center (AISC)**

The AISC has spent a number of years conducting research on issues affecting Native American Indian communities. The center has sponsored conferences on issues including California tribes, repatriation, federal recognition, and Indian gaming. The AISC offers a number of publications on issues ranging from Contemporary Native American Issues and Native American Politics to Native American Theater and Native American Literature.

UCLA
American Indian Studies Center
3220 Campbell Hall
Los Angeles, CA 90095-1548
Phone: (310) 825-7315
Fax: (310) 206-7060
<http://www.aisc.ucla.edu/>

Private Organizations and Foundations

American Farmland Trust (AFT)

Since its founding in 1980, the AFT has helped to achieve permanent protection for over a million acres of American farmland. The AFT focuses its strategies on protecting land through publicly funded agricultural conservation easement programs and encouraging conservation practices in community planning and growth management.

American Farmland Trust
1200 18th Street NW
Washington, D.C. 20036
Phone: (202) 331-7300
Fax: (202) 659-8339
<http://www.farmland.org/>

Inter-Tribal Council of California, Inc. (ITCC)

The key role of the Inter-Tribal Council of California (ITCC) is to assist in bridging relationships between California tribal governments and other organizations, including local government agencies. The ITCC offers workshops on Native American cultural proficiency and tribal governments for the purpose of educating non-Native Americans on how to effectively communicate with tribal governments, in addition to other training and technical assistance. The ITCC is experienced in assisting the development of Memoranda of Understanding and Agreement, protocols, and educational outreach materials.

Inter-Tribal Council of California, Inc.
2755 Cottage Way, Suite 14
Sacramento, CA 95825
Phone: (916) 973-9581
Fax: (916) 973-0117

Land Trust Alliance (LTA)

The Land Trust Alliance promotes voluntary land conservation by offering training, conferences, literature, reports, and other information on land conservation. The LTA has several publications discussing conservation techniques. Their web site addresses different conservation options for landowners and includes questions and answers about conservation easements, land donation, and bargain sale of land.

Land Trust Alliance
1331 H Street NW, Suite 400
Washington D.C. 20005-4734
Phone: (202) 638-4725
Fax: (202) 638-4730
<http://www.lta.org/conserve/options.htm>

Native American Land Conservancy

The Native American Land Conservancy is a nonprofit corporation formed for the conservation and preservation of Native American sacred lands.

Native American Land Conservancy
Kurt Russo, Executive Director
PO Box 1829
Indio, CA 92202
Phone: (800) 6770-6252

The Nature Conservancy (TNC)

The Nature Conservancy is a non-profit organization that works with communities, businesses, and individuals to preserve lands with natural and cultural resources.

The Nature Conservancy
4245 North Fairfax Drive, Suite 100
Arlington, VA 22203-1606
<http://nature.org/>

Southern California Tribal Chairmen's Association (SCTCA)

The Southern California Tribal Chairmen's Association (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 19 Federally recognized Indian tribes in Southern California. The Primary goals and objectives of SCTCA are the health, welfare, safety, education, culture, economic and employment opportunities for its tribal members. A board of directors comprised of tribal chairpersons from each of its member tribes governs SCTCA.

Southern California Tribal Chairmen's Association
Denis Turner
Executive Director
Phone: (760) 742-8600 x100
<http://www.sctca.net/>

Trust for Public Land

The Trust for Public Land (TPL) is a national, nonprofit, land conservation organization that conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come. Since 1972, TPL has worked with willing landowners, community groups, and national, state, and local agencies to complete more than 2,700 land conservation projects in 46 states, protecting nearly 2 million acres.

Trust for Public Land National Office
116 New Montgomery St., 4th Floor
San Francisco, CA 94105
Phone: (415) 495-4014
Fax: (415) 495-4103
<http://www.tpl.org>

Exhibit A: Sample Request to the NAHC for Tribal Contact Information

	TRIBAL CONSULTATION LIST REQUEST NATIVE AMERICAN HERITAGE COMMISSION 915 CAPITOL MALL, ROOM 364 SACRAMENTO, CA 95814 (916) 653-4082 (916) 657-5390 - Fax E-mail -- nahc@pacbell.net	
---	---	---

Project Title: _____

Local Government: _____ **Contact Person:** _____

_____ **Phone:** _____

Street Address: _____ **Fax:** _____

City: _____ **Zip:** _____

Project Location:

County: _____ **City/Community:** _____

Local Action Type:

___ General Plan ___ General Plan Amendment ___ General Plan Element ___ Specific Plan

Project Description:

NAHC Use Only

Date Received: _____

Date Completed _____

Native American Tribal Consultation lists are only applicable for consulting with California Native American tribes per Government Code Section 65352.3.